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In The

Supreme Court of the United States

October Term, 1998

CHARLES GOSS,

Cross-Petitioner,

vs.

CITY OF LITTLE ROCK,

Cross-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a separate, severable issue, not designated as an issue on appeal, may be reversed *sua sponte* by an appellate court.

Whether a mandatory injunction may be reversed by an appellate court absent a finding of abuse of discretion or impropriety on the part of the lower court.

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-Petitioner Charles Goss respectfully submits his Conditional Cross-Petition for Writ of Certiorari, pursuant to Rule 12.5 of the *Rules of the Supreme Court of the United States*, to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS DELIVERED BELOW

The most recent opinion of the United States Court of Appeals for the Eighth Circuit is reported at 151 F.3d 861 (8th Cir. 1998), was issued on August 10, 1998, and is printed in its entirety at Appendix A of the Petition for Writ of Certiorari filed herein by Petitioner City of Little Rock. The Order of the United States Court of Appeals for the Eighth Circuit denying the City of Little Rock's petition for rehearing and the suggestion for rehearing *en banc* was issued on October 1, 1998, and is printed in its entirety at Appendix G of the Petition for Writ of Certiorari filed herein by Petitioner City of Little Rock. The previous opinion of the United States Court of Appeals for the Eighth Circuit is reported at 90 F.3d 306 (8th Cir. 1996), was issued on July 23, 1996, and is printed in its entirety at Appendix B of the Petition for Writ of Certiorari filed herein by Petitioner City of Little Rock. The relevant prior orders of the United States District Court, Eastern District of Arkansas, Western Division, are unreported, were issued on September 25, 1995 (Memorandum and Order), October 25, 1995 (Order), February 20, 1997 (Memorandum and Order), and May 13, 1997

(Order), respectively, and are printed in their entirety at Appendices C through F, respectively, of the Petition for Writ of Certiorari filed herein by Petitioner City of Little Rock.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The opinion of the United States Court of Appeals for the Eighth Circuit was delivered on August 10, 1998. *See* Petitioner's Appendix A. On October 1, 1998, the United States Court of Appeals for the Eighth Circuit denied Petitioner's timely Petition for Rehearing and Suggestion for Rehearing *En Banc*. *See* Petitioner's Appendix G. This Conditional Cross-Petition is filed in response to the Petition for Writ of Certiorari filed by Petitioner City of Little Rock, docketed on December 30, 1998, as United States Supreme Court Docket Number 98-1056. This Conditional Cross-Petition is filed within the time allowed by law in Rule 12.5 of the *Rules of the Supreme Court of the United States*, upon which rule Cross-Petitioner expressly relies. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5 to the United States Constitution states in pertinent part as follows:

> No person shall . . . be deprived of . . . property, without due process of law; nor shall private

> property be taken for public use, without just compensation.

Amendment 14, Section 1 to the United States Constitution states in pertinent part as follows:

> . . . [N]or shall any state deprive any person of . . . property, without due process of law . . .

Article 2, Section 22 of the Arkansas Constitution of 1874 states as follows:

> The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.

STATEMENT OF THE CASE

Cross-Petitioner, Charles Goss, owns a small business in Little Rock, Arkansas, consisting of a convenience store, gas station, laundromat and car wash, which small business Mr. Goss has owned since 1973. Petitioner City of Little Rock, Arkansas, is a municipality, and is the capitol of the State of Arkansas.

In 1971, at the time Mr. Goss purchased the approximately 3.7 acres of property at issue, the property was located in a portion of rural, unincorporated Pulaski County, some ten (10) miles southwest of downtown Little Rock. Within two (2) years after purchasing the property, Mr. Goss began to operate a series of small, neighborhood-oriented businesses upon the property, including a convenience store, gas station, laundromat and car wash. In 1985, the City of Little Rock annexed

that portion of rural, unincorporated Pulaski County within which Mr. Goss' property is located, and zoned the area by default as R-2, Single Family Residential. As the R-2 zoning imposed by default upon the property did not conform to the use to which the property was being put in 1985, Mr. Goss continued to utilize the property as he had since 1973 pursuant to the non-conforming use exception in the Little Rock City Ordinances.

As the R-2 zoning imposed by default upon the property did not conform to the use of the property, and as Mr. Goss needed the property rezoned to conform to its use in order to sell the property, in early 1993 Mr. Goss applied to the City for rezoning of the property. After completion of the application, Mr. Goss went before the City's Planning Commission, which recommended that Mr. Goss' rezoning application be approved, *on the condition that* Mr. Goss' deed to the City, via a Quitclaim Deed supplied by the City's Planning Commission, a 55 foot right-of-way extending across his 633.38 feet of frontage on Stagecoach Road, also known as State Highway Number Five. The City's Planning Commission informed Mr. Goss via letter that if Mr. Goss did not deliver the demanded Quitclaim Deed to the City within twenty (20) days, the City's Planning Commission would take approval of Mr. Goss' rezoning petition off of the City Board of Directors' meeting agenda. Mr. Goss refused to deliver the demanded Quitclaim Deed to the City's Planning Commission, and his rezoning petition was taken off of the City Board of Directors' meeting agenda. Instead, Mr. Goss asked that the dedication requirement imposed by the City's Planning Commission be waived.

Finally, and only after hiring a succession of attorneys to represent him, Mr. Goss was allowed to bring the item before the City's Board of Directors on February 21, 1995 for a final vote upon the waiver of the City's dedication requirement some twenty (20) months after Mr. Goss initially filed the application. The Board of Directors of the City of Little Rock, after a lengthy discussion, refused to approve Mr. Goss' requested waiver of the dedication requirement of a 55 foot right-of-way across the front of the property. Instead, the City formally imposed the condition that, in order for the property to be rezoned, Mr. Goss would be required to dedicate to the City of Little Rock, free of charge, a 55 foot right-of-way in exchange for rezoning the property at issue to C-3. Mr. Goss refused to consent to the City's demand.

As the only state remedy available to Mr. Goss would result in the loss of his property to the City of Little Rock, which is the result Mr. Goss sought to prevent, Mr. Goss filed suit against the City of Little Rock seeking injunctive relief to prevent the taking altogether, as the City of Little Rock had applied an unconstitutional condition to the grant of its discretionary authority to rezone his property. The United States District Court, Eastern District of Arkansas, Western Division, quickly dismissed Mr. Goss' lawsuit based upon Rules 12(b)(6) and 12(b)(1) of the *Federal Rules of Civil Procedure* for failure to state a claim upon which relief could be granted and for lack of subject matter jurisdiction, and specifically stated that *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) did not apply to the facts of the case. *See* Petitioner's Appendices C & D. Mr. Goss timely appealed to the United States Court of

Appeals for the Eighth Circuit, which thereafter reversed the district court's dismissal, and specifically stated that *Nollan* and *Dolan* did apply to the facts of the case. *See* Petitioner's Appendix B.

The case was tried before District Court Judge Susan Webber Wright on January 13 and 14, 1997. The district court issued its opinion on February 20, 1997, which opinion concluded that the City of Little Rock had indeed attempted a taking of Mr. Goss' property by applying an unconstitutional condition to its grant of rezoning, in contravention of *Nollan* and *Dolan*, and, in accordance with the injunctive relief requested by Mr. Goss in his Complaint, issued a mandate to the City of Little Rock to rezone Mr. Goss' property to C-3, but denied Mr. Goss his compensatory damages and attorney's fees. *See* Petitioner's Appendices E and F. The City of Little Rock, Petitioner herein, did not seek a Writ of Certiorari before this Honorable Court within the time allowed by Rule 13.1 of the *Rules of the Supreme Court of the United States.*

Petitioner timely appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit, and, for the second time, argued the two (2) issues which the Eighth Circuit had previously decided against it: first, that the district court lacked jurisdiction to hear the case, and second, that neither *Nollan* nor *Dolan* applied to the facts of the case. Petitioner neither independently appealed nor independently argued reversal of the district court's decision to grant Mr. Goss the mandatory injunctive relief which he sought, the rezoning of the property at issue to C-3 without the requirement that Mr. Goss donate a significant portion of it to Petitioner,

except as an expected result of any reversal of the two (2) issues which the Eighth Circuit had previously decided against it. *See* Petitioner's Appendix B. Mr. Goss timely cross-appealed the district court's denial of compensatory damages and attorney's fees.

After oral argument, the United States Court of Appeals for the Eighth Circuit issued its opinion on August 10, 1998, in which it refused to reconsider Petitioner's arguments regarding subject matter jurisdiction and the application of the *Nollan/Dolan* line of cases, stating specifically as follows:

> The time to make these arguments has come and gone. We rejected both contentions the first time Little Rock made them. Indeed, we remanded with instructions to the District Court to apply *Dolan* in determining whether the dedication requirement was a taking. *See Goss*, 90 F.3d at 309-310. Having rejected Little Rock's arguments before, we will not reconsider them now. *Goss v. City of Little Rock*, 151 F.3d 861, 862 (8th Cir. 1998). *See also* Petitioner's Appendix A at A3.

The Eighth Circuit further reversed the district court's denial of attorney's fees to Mr. Goss, but affirmed the district court's denial of compensatory damages, neither of which is being brought for review before this Honorable Court. Although Petitioner did not appeal it, and without any comment regarding an abuse of discretion on the part of the district court nor any comment regarding the propriety of the district court's issuance of mandatory injunctive relief to Mr. Goss, the Eighth Circuit *sua sponte* reversed the mandatory injunction granted to Mr. Goss by the district court, that Petitioner rezone

Mr. Goss' property to C-3 without the attachment of the unconstitutional condition Petitioner attempted to place upon the grant of Mr. Goss' rezoning application. *See* Petitioner's Appendix A.

In its Petition for Writ of Certiorari filed herein, Petitioner once again attempts to argue the same two (2) issues it has argued unsuccessfully twice before in the Eighth Circuit: that the district court lacked jurisdiction to hear this case at all, and that the *Nollan/Dolan* line of cases is inapplicable to the facts of this case. This Conditional Cross-Petition addresses only the issue of the *sua sponte* reversal of the district court's issuance of a mandatory injunction to Petitioner to rezone Mr. Goss' property to C-3 without the attachment of the unconstitutional condition Petitioner attempted to place upon the grant of Mr. Goss' rezoning application.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

I. The Eighth Circuit's *sua sponte* reversal of a separate, severable issue, not designated as an issue on appeal, has improperly expanded the jurisdiction conferred upon United States Circuit Courts of Appeals, in conflict with decisions of other United States Circuit Courts of Appeals, thereby warranting review by this Honorable Court.

The jurisdiction of United States Courts of Appeals, set forth in 28 U.S.C. § 1291, while encompassing all final orders of district courts, is not without limits. In contravention of case law extant in the Third and Fifth Circuit Courts of Appeals, and in conflict with its own prior case

law, the Eighth Circuit Court of Appeals exceeded its jurisdiction by reversing, *sua sponte*, the mandatory injunction issued by the district court, as the issue was not appealed from by the Petitioner herein at any stage.

The *Federal Rules of Appellate Procedure* requires, in Rule 10(b)(3), *inter alia*, that an appellant file a statement of the issues it intends to present on the appeal and serve a copy of same upon the appellee in order to apprize the appellee of the specific issues to be appealed. In the second *Goss* appeal, and in accordance with Rule 10(b)(3), the City of Little Rock designated the issues on appeal as three-fold: subject matter jurisdiction (previously decided in Mr. Goss' favor in the first *Goss* appeal); application of *Dolan* rough proportionality (also previously decided in Mr. Goss' favor in the first *Goss* appeal); and whether the City had a legitimate interest to support the dedication requirement attached to Mr. Goss' rezoning application, and to deny the rezoning if Mr. Goss refused to acquiesce to the dedication.

In the second *Goss* decision, the Eighth Circuit ruled that the first two (2) issues identified and argued by the City of Little Rock were *res judicata*, as both issues had been resolved in Mr. Goss' favor in the first *Goss* appeal in 1996. *See Goss v. City of Little Rock*, 151 F.3d 861, 862 (8th Cir. 1998); Petitioner's Appendix A, at A3. Regarding the third issue identified and argued by the City of Little Rock, the Eighth Circuit stated as follows:

> Little Rock does not respond to the District Court's conclusion that it failed to carry its burden of proving rough proportionality between the dedication and the impact of the proposed rezoning. Instead Little Rock makes several

> arguments that have nothing to do with rough proportionality. Perhaps Little Rock takes this course because of its belief that *Dolan* is irrelevant to this case. If so, that is unfortunate for the city because, as discussed above, the argument that *Dolan* does not apply is foreclosed by our contrary decision in the previous appeal. At any rate, Little Rock's arguments, which we will briefly discuss, do not help its case. Little Rock argues that it had a legitimate reason for demanding the dedication. This is true, but it does not prove that the legitimate reason was proportionate to the demand . . . *Id.* at 863; A5.

The City of Little Rock did not, at any stage of the second *Goss* appeal, designate the district court's issuance of the mandatory injunction requiring it to rezone Mr. Goss' property as an issue to be decided by the Eighth Circuit on appeal. The Eighth Circuit's subsequent reversal of the district court's issuance of the mandatory injunction requiring the City of Little Rock to rezone Mr. Goss' property comes as a surprise, considering that, shortly thereafter, the Eighth Circuit itself, in *C & S Acquisitions Corp. v. Northwest Aircraft, Inc.*, 153 F.3d 622 (8th Cir. 1998) indicated that notice must be given to the appellee of an appellant's intent to appeal separate, distinct issues. *Cf. Davenport v. Riverview Gardens Sch. Dist.*, 30 F.3d 940 (8th Cir. 1994) (noting that omission of reference to the order appealed from jurisdictionally bars the appeal); *see also Smith v. Barry*, 502 U.S. 244, 112 S.Ct. 678, 116 L.Ed.2d 678 (1992) (contents of notice of appeal are jurisdictional and must be satisfied before a court of appeals may entertain the appeal); *Trust Co. of La. v. N.N.P., Inc.*, 104 F.3d 1478 (5th Cir. 1997) (court of appeals is without jurisdiction to hear challenges to rulings or

orders not specified in the designation of issues on appeal).

The Third Circuit Court of Appeals, in *MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1092 (3rd Cir. 1995), *cert. denied*, ___ U.S. ___, 117 S.Ct. 64, 136 L.Ed.2d 25 (1996), noted that a court of appeals does not acquire jurisdiction over any issue which is not designated for appeal in accordance with the *Federal Rules of Appellate Procedure*, thereby indicating that a United States Court of Appeals may not *sua sponte* reverse separate, distinct issues from those appealed from by one of the parties to the appeal, unless the reversal of such an issue is made necessary by the reversal of an appropriately designated issue on appeal. Applying the Third Circuit rule to this case, the Eighth Circuit acted improperly by reversing the mandatory injunction, as the mandatory injunction was not designated as an issue on appeal by any party to the appeal, nor was the reversal of the mandatory injunction necessitated by the reversal of an appropriately designated issue on appeal.

Due to the apparent conflict between the Third, Fifth and Eighth Circuits regarding the jurisdiction of the United States Courts of Appeals to hear and decide issues which are not designated as such on appeal, this Honorable Court should grant Cross-Petitioner's Conditional Cross-Petition for Writ of Certiorari.

II. The Eighth Circuit's reversal of a mandatory injunction, without a finding of abuse of discretion or impropriety on the part of the district court, is in conflict with decisions of other United States Circuit Courts of Appeals, thereby warranting review by this Honorable Court.

A district court is given broad discretion in its decision to evaluate and determine the propriety of issuing injunctive relief, and its discretion will not be overturned absent evidence of strong or clear abuse of its discretion in the issuance of an injunction. *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221 (10th Cir. 1997); *Conservation Law Foundation, Inc. v. Busey*, 79 F.3d 1250 (1st Cir. 1996); *see also Malkentzos v. DeBuono*, 102 F.3d 50 (2nd Cir. 1996); *Stanley v. University of Southern California*, 13 F.3d 1313 (9th Cir. 1994).

In the case at hand, the Eighth Circuit's decision is in apparent conflict with the decisions of the First, Second, Ninth and Tenth Circuits regarding the standard to overturn the issuance of an injunction, as the Eighth Circuit does not state anywhere in its decision that the district court abused its discretion in granting Mr. Goss' prayer for injunctive relief. Regarding its reversal of the district court's injunction, the Eighth Circuit states only as follows:

> Next we consider the question of remedy. The District Court ordered that, because the dedication requirement was a taking, Little Rock must rezone Goss's property without the requirement. We reverse this order. As discussed above, Little Rock has a legitimate interest in declining to rezone Goss's property, and the city may pursue that interest by denying Goss's rezoning

> application outright, as opposed to denying it because of Goss's refusal to agree to an unconstitutional condition, as the city did here. [footnote omitted] *See Nollan*, 483 U.S. at 835-36, 107 S.Ct. 3141 (stating that the government may deny the applicant's request outright if it has a legitimate interest in doing so). *Goss*, 151 F.3d 861, 863-864 (8th Cir. 1998); Petitioner's Appendix, A, at A6.

The Eighth Circuit does not at all address whether or not it found the district court's issuance of the mandatory injunction in this case to be an abuse of discretion, neither does it discuss whether it found the district court's issuance of the mandatory injunction to be improper in any way. Rather, it utilizes the *Nollan* case, standing alone, as the rationale behind its reversal. In doing so, the Eighth Circuit has significantly departed from the case law of other circuits, as stated *supra*, which indicates that an injunction will not be overturned in the absence of the district court's abuse of discretion or impropriety in its issuance, which significant departure warrants review by this Honorable Court to resolve the apparent conflict among the United States Courts of Appeals, and to maintain consistency in this area of law.

CONCLUSION

For the foregoing reasons, Cross-Petitioner's Conditional Cross-Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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